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No. 87-7

Supreme Court, U.S.  
FILED

JUL 24 1987

JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

FREDRIC E. and ADRIAN MICHELS;  
ROBERT and TERESA KLEIN;  
RICHARD and PAMELA RECEVEUR; and  
McKINLEY and WILMA THURMAN - Petitioners

*versus*

TIMES MIRROR CABLE TELEVISION OF  
LOUISVILLE, INC.;  
STORER COMMUNICATIONS OF JEFFER-  
SON COUNTY, INC.;  
LOUISVILLE GAS & ELECTRIC COM-  
PANY; and  
SOUTH CENTRAL BELL TELEPHONE  
COMPANY - - - - - Respondents

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### STORER'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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### **STATEMENT OF AFFILIATION**

Storer communications of Jefferson County, Inc. is indirectly owned in part by SCI Holdings, Inc. a Delaware corporation.

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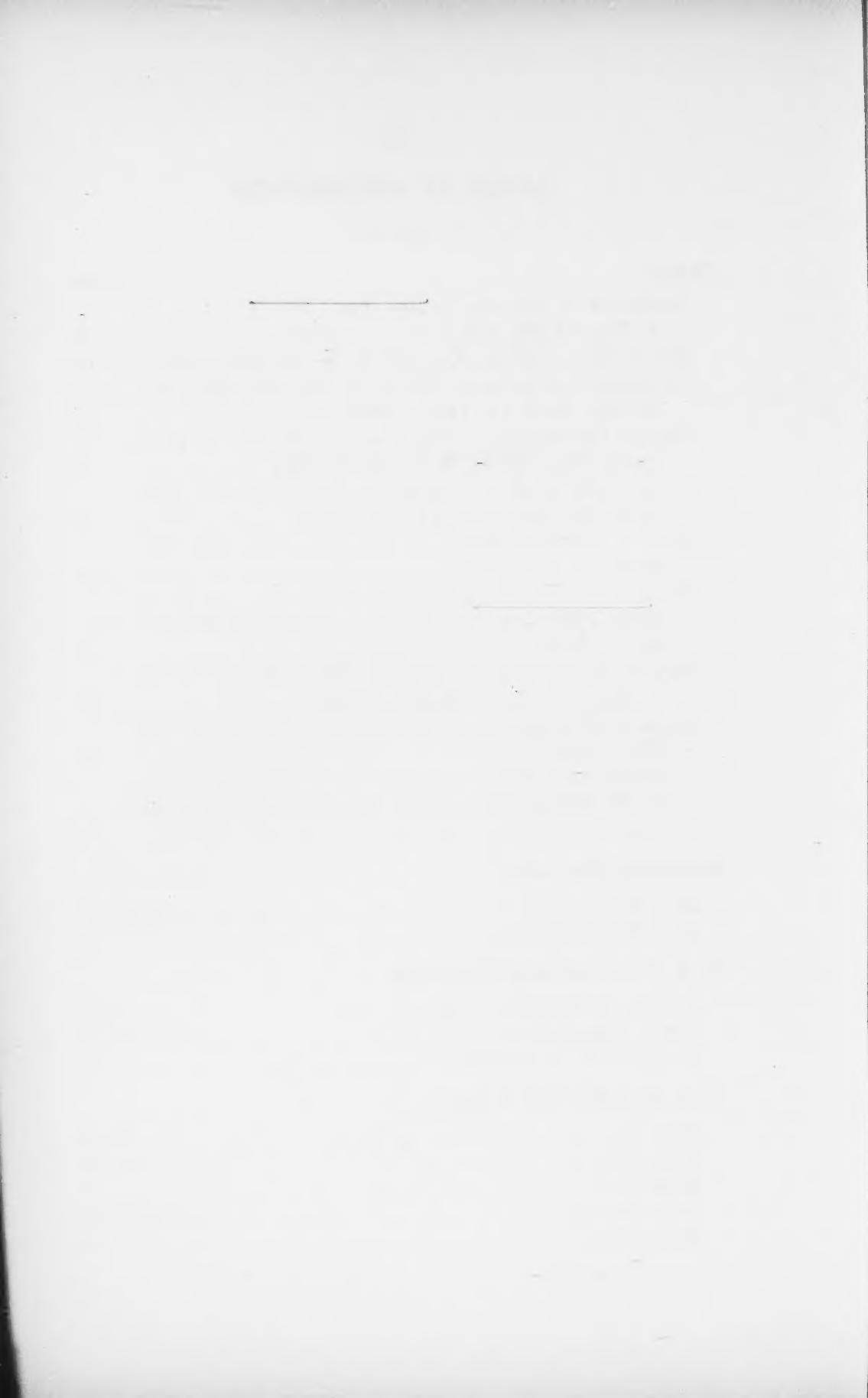
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Comes the Respondent, Storer Communications of Jefferson County, Inc. (hereinafter "Storer"), and requests that this Court deny the Petition for Writ of Certiorari based on the facts, law and reasoning set forth herein.

### COUNTERSTATEMENT OF THE CASE

Petitioners are four couples who have been and currently are cable television subscribers. The action originally brought by the Petitioners in the state trial court averred a common law action for trespass by Storer in serving those subscribers. The complaint filed by the Petitioners did not describe any cause of action other than trespass. It did not refer to any state statutes, federal statutes, state regulations, federal regulations, state constitutional provisions or federal constitutional provisions.

The complaint named Storer, Times Mirror Cable Television of Louisville, Inc. (hereinafter "Times Mirror"), Louisville Gas and Electric Company (hereinafter "LG&E"), and South Central Bell Telephone Company (hereinafter "South Central"). None of these four corporations are governmentally owned. The complaint includes no claims against the United States of America, the Commonwealth of Kentucky, their agencies or officials, nor any branch of local government. No allegations of operation under color of state or federal law were made in the complaint. No claims of condemnation or eminent domain were made. No allegations were made against the franchising authority.

The Petitioners revised their complaint on three occasions, but the characteristics described above never changed.

Storer and the other Respondents argued to the state trial court that actions of the Petitioners amounted to implied or express consent to the presence of cable television equipment, wires, and appurtenances in the utility easements which burdened their properties, in the drop-lines to their homes, and the equipment inside their homes. Respondents argued that consent of the Petitioners vitiated any claim of trespass they might have.

The state trial court granted summary judgment to Storer and the other Respondents. It found that Petitioners had consented to cable television's presence and so could not claim trespass. The state trial court issued findings related solely to trespass and consent.

The intermediate appellate court, the Court of Appeals of Kentucky, declined to review the soundness of the trial court's rationale, choosing instead to find that the utility easements in question were susceptible of apportionment to cable television usage. Additionally, based on prior Kentucky caselaw, the Court of Appeals found cable television to be a utility consistent with the utility easements in question in this case. See *City of Owensboro v. Top Vision Cable Co. of Kentucky*, Ky., 487 S. W. 2d 283 (1972). These two findings were the basis for affirmation of the result of the state trial court's judgment.

The Supreme Court of Kentucky then granted Discretionary Review of the Court of Appeal's decision and returned to the findings and rationale of the state trial court in rendering its affirming decision. The Supreme Court of Kentucky found the record clear that Petitioners had no objection to the installation of the cable television equipment when it was installed, that Petitioners signed an agreement permitting the cable television companies access to their properties for installation and maintenance of the cable television equipment, and that Petitioners agreed to the installation of an aerial drop line across their properties outside the confines of the easement to connect the cable within the easement to their residences (See Appendix to Petition for Writ, page 3a). The Supreme Court of Kentucky affirmed the decision in favor of Storer and the other Respondents based on the negation of any claim of trespass by the existence of Petitioners' consent to the presence of Storer and Times Mirror.

## ARGUMENTS IN OPPOSITION TO PETITION

### I. The Petitioners Fail to Establish Certiorari Jurisdiction.

There is no federal case or controversy. The Petitioners seek review by this Court of a judgment entered by a state court. The appellate jurisdiction of the United States Supreme Court is not completely unfettered. The Court's certiorari jurisdiction over state court judgments is determined by 28 U.S.C. §1257. For the Petitioners to even receive consideration of their petition they must first establish the Court's certiorari jurisdiction.

Under 28 U.S.C. §1257 the Petitioners must establish all of the following factors in their favor:

- (i) the state court decision is final;
- (ii) the decision is rendered by the state's highest court;
- (iii) a federal question was duly raised and adjudicated in the state court;
- (iv) the federal question is substantial; and
- (v) the state court judgment does not rest on adequate non-federal grounds.

Consistent with 28 U.S.C. §1257 the Petitioners are required by Supreme Court Rule 21.1(h) to specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; and include pertinent citation to the record where the matters appeared.

Firstly, Petitioners state the certiorari jurisdiction of this Court is based on 28 U.S.C. 2101(c) and Rule 20.2. See Petition for Writ, pages 1-2. Each of those citations deals with the timeliness of a petition, not with the jurisdiction of this Court. Secondly, the Petitioners have neglected to comply with S.C. Rule 21.1 (h). There are no references in Petitioners' Statement of the Case to when, where or how any federal question(s) was (were) raised, passed upon, or preserved. Petitioners therefore fail to comply with 28 U.S.C. §1257. Under Supreme Court Rule 21.5 failure of Petitioners to present with accuracy and clarity whatever is essential to an understanding of the points requiring consideration is sufficient reason for denial of the Petition.

Storer submits to this Court that there was no substantial (or even insubstantial) federal question raised before the Supreme Court of Kentucky which was considered as a part of its decision. The failure of the Petitioners to comply with 28 U.S.C. §1257 and Supreme Court Rule 21.1(h) is directly attributable to the lack of a federal question. Under 28 U.S.C. §1257 this Court lacks certiorari jurisdiction to even consider whether or not to grant certiorari.

Petitioners refer in their Petition to a "taking" under the Fifth Amendment, to the inability of implied consent to cause waiver of a "constitutional right," and to the principle that a law cannot "unconstitutionally" impair a contract right; but these are recently contrived purported "federal questions" and were not raised in the complaint nor were they part of

the decision by the Supreme Court of Kentucky. This Court may not review federal constitutional issues raised before it for the first time on review of state court decisions. The federal question must have been raised and decided in the state court. If both of those factors do not appear on the record, appellate jurisdiction fails. *Cardinale v. Louisiana*, 394 U. S. 437, 438; 22 L. Ed. 2d 398; 89 S. Ct. 1161 (1968). This Court has also held that it is essential to the jurisdiction of this Court in reviewing a state court decision that it must affirmatively appear from the record that a federal question was presented to the highest state court and that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U. S. 206, 212-213; 82 L. Ed. 751; 58 S. Ct. 528 (1937).

The complaint poses only a simple cause of action based on trespass. The trial court properly granted summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U. S. \_\_\_, 91 L. Ed. 2d 202, 106 S. Ct. \_\_\_ (1986). The Supreme Court of Kentucky agrees with the finding of consent. No federal question was involved or included in that decision.

Article I, Section 10(1) of the United States Constitution is discussed at length by Petitioners, but it was not presented to nor considered by the trial court or the Supreme Court of Kentucky as a federal issue or question bearing on this case. Neither the Commonwealth of Kentucky nor any subdivision of state government nor any branch of local government is named

as a party. Article I, Section 10(1) applies only as a limitation of the legislative power of the states. *Peick v. Pension Benefit Guaranty Corp.*, 724 F. 2d 1247, 1263 (7th Cir., 1983) certiorari denied 104 S. Ct. 3554. Petitioners never presented to the state trial court or the Supreme Court of Kentucky any allegations of state legislative action which impaired their property rights.

The Supreme Court of Kentucky agreed with the state trial court that certain actions of Petitioners equalled consent. As a result it upheld dismissal of the Petitioners' complaint. Petitioners characterize this in their petition as an impairment of contract. At page 6 of the Petition for Writ, Petitioners equate the decision of the Supreme Court of Kentucky with a legislative act impairing a contract. Such an argument is incorrect under the proper intent of Article I, Section 10(1). *Cross Lake Club v. Louisiana*, 224 U. S. 632, 638; 56 L. Ed. 924; 32 S. Ct. 577 (1911), points out that a legislative act is required for application of Article I, Section 10(1), not a court decision determining property rights between two private individuals.

The Fifth Amendment and the Petitioners' assertion of a "taking" also have no bearing on this case. In the text of their Petition the Petitioners do not utilize the term "taking" in the sense intended by the Fifth Amendment. The Petitioners' action has never involved claims of eminent domain, condemnation, or inverse condemnation. Neither the Fifth Amendment nor the 14th Amendment is mentioned in Petitioners' complaint. The Supreme Court of Kentucky did not consider nor did it mention either Amendment in its

decision. No governmental entity is named by the Petitioners as a party to the complaint or as a participant in the facts allegedly underlying the cause of action set forth in the complaint.

Storer submits that the record is clear that the Supreme Court of Kentucky did not adjudicate, comment upon, nor involve itself with any federal question. The record is also clear that Petitioners did not raise below any allegations of a legislative act impairing a contract nor of a taking under the Fifth Amendment. They brought only a simple trespass action against four private corporations. Under 28 U.S.C. § 1257 this Court has no certiorari jurisdiction to consider any such arguments at this late date.

Storer submits further that Petitioners fail to show that the decision of the Supreme Court of Kentucky does not rest on adequate non-federal grounds. "This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U. S. 117, 125; 89 L. Ed. 789; 65 S. Ct. 459 (1944). It must affirmatively appear that a federal question was decided and that its decision was essential to disposition of the case; and where it is not clear whether the judgment rests on a federal ground or an adequate state one, this Court will not review. *Herb v. Pitcairn, supra* at 126.

The decision of the Supreme Court of Kentucky is contained in the Appendix to the Petition for Writ at page 1a. It rests on purely state grounds without

any mention of a federal ground nor a federal question or issue; nor was it remotely necessary for the court to consider any federal issues, questions or grounds. The Supreme Court of Kentucky considered facts describing certain actions of the Petitioners, found consent on the part of the Petitioners, and agreed that trespass could not exist.

The Petitioners' failure to comply with and satisfy the requirements of 28 U.S.C. § 1257 and Supreme Court Rule 21.1(h) leave this Court with no jurisdiction to consider the Petition for Writ of Certiorari. The Petition for Writ of Certiorari must be denied.

## **II. The Petition Lacks Proper Character Under Rule 17.**

Storer asserts that Petitioners have not and cannot affirmatively establish this Court's certiorari jurisdiction. Nevertheless, but notwithstanding Storer's arguments set forth hereinabove at Argument I, Storer submits the following comments regarding Supreme Court Rule 17 and Petitioners' request for review on writ of certiorari.

Supreme Court Rule 17 is the procedural rule promulgated by this Court to determine when it will grant review under certiorari jurisdiction. The Rule immediately points out that certiorari will only be granted "when there are special and important reasons therefor". It then sets out in three subparagraphs illustrations of the character of reasons that will be considered. The Petitioners fail to place themselves within any of the illustrations provided by Rule

17 and do not present a "special and important reason" for grant of the writ of certiorari.

Looking first to the three illustrative subparagraphs it is clear that subparagraph (a) cannot be applicable. This action arises out of a state court decision, not one by a federal court of appeal.

Subparagraph (b) does deal with a state court decision, so it may be applicable. It suggests that where a state court decides a federal question in a way which conflicts with (i) a decision of another state court of last resort or (ii) with a federal court of appeals, a writ of certiorari may be appropriate.

Applying this illustration to the Petition is not favorable to the Petitioners. The Petitioners offer three reasons for granting the writ: (1) they did not consent to trespass, (2) the easements on their properties were not apportionable, and (3) cable television is not a public utility.

First of all, the decision of the Supreme Court of Kentucky does not address apportionability of the Petitioners' easements nor does it address cable television's status as a public utility. It cannot therefore conflict with any other state or federal decisions on these points. Nowhere in Reasons II and III do Petitioners argue that a conflict exists or present any discussion of a clear conflict; they simply argue the merits. Apportionability and public utility status were part of the Kentucky Court of Appeals decision; but that was superceded by the Supreme Court of Ken-

tucky. Reasons II and III do not satisfy or meet the illustration provided in subparagraph (b) of Rule 17.1.

Secondly, Reason I of the Petition contains a lengthy argument that one cannot impliedly or unintentionally waive his constitutional rights. The "constitutional right" asserted is apparently Petitioner's right to protect their property under the Fifth Amendment. However, as was pointed out in Argument I hereinabove, this case does not involve any Fifth Amendment claim and never has. Petitioners' complaint has no such claim, the Supreme Court of Kentucky made no mention of a Fifth Amendment issue, and it could not have considered such an issue without any allegations to that effect by Petitioners and without a governmental entity as a party. The Fifth Amendment, standing alone without mention of the 14th Amendment, applies to the United States; but the United States is not a party to this action. The Cable Communications Policy Act, 47 U.S.C. § 541, et seq., is mentioned in Petitioners' Petition, but the Act was never addressed by the state trial court or the Supreme Court of Kentucky. Raising the Cable Communications Policy Act is a red herring since neither its application nor interpretation was ever discussed. It appears in the Petition solely as a desperate grab at legitimacy by the Petitioners.

Reason I is simply an argument on an issue not addressed by the Supreme Court of Kentucky. The Fifth Amendment was not addressed, so the decision of the Supreme Court of Kentucky cannot conflict with

any other decision that does address an issue related to the Fifth Amendment. Reason I fails to satisfy or meet the "conflict" illustration provided in subparagraph (b) of Rule 17.1.

Thirdly, Reasons I, II and III do not clearly show that the Supreme Court of Kentucky decided a federal question. The decision never addresses the Fifth Amendment, apportionability, or public utility status. Reasons I, II, and III do not contain any citations by Petitioners to where the Supreme Court of Kentucky made any such decision. Storer has already discussed at Argument I the Petitioners' failure to cite where the federal questions were presented and how they were passed upon. Petitioners simply assume that a constitutional right was properly presented by them and adjudicated in a contradictory manner, and go on to argue the merits as opposed to establishing the nuts and bolts underpinning their right to certiorari.

Storer notes that Petitioners do ask this Court at page 11 of the Petition to apply *Satin v. Hialeah Race Course, Inc., Fla.*, 65 So. 2d 475 (1953) instead of the case relied upon by the Supreme Court of Kentucky—*Bradford v. Clifton, Ky.*, 379 S. W. 2d 249 (1964). Petitioners do not characterize *Satin* as conflicting with *Bradford*, but instead ask this court to rewrite the decision, inserting *Satin* instead of *Bradford*, and so reverse the decision. That is an argument on the merits. If literary license is stretched just short of the breaking point, and the citation to *Satin* is considered to be the assertion of a conflict, that argument fails to sup-

port granting a writ because no federal question is involved in this case or in *Satin*<sup>1</sup>.

Subparagraph (c) of the Supreme Court Rule 21.1 also deals with state court decisions. It states that where a state court has decided an important question of federal law which has not been, but should be decided by this Court, or has decided a federal question in conflict with a decision of this Court that a writ of certiorari may be appropriate.

Storer chooses not to belabor this Court by constantly repeating arguments. Subparagraph (c) does not apply because (i) no decision on or involving a federal law or question is made herein; (ii) no conflict is asserted by Petitioners; and (iii) no conflict could exist with Reasons II and III as presented by Petitioners since the Supreme Court of Kentucky did not rule on apportionability or public utility status.

This case is a simple trespass action under the common law of Kentucky. That is the way it was brought by the Petitioners in their complaint; that is the way it was handled by the state trial court; and that is the way it was disposed of by the Supreme Court of Kentucky. The case was decided on basic state law grounds related to trespass and consent. No federal issues or questions were part of the decision by the Supreme Court of Kentucky. "Special and important reasons" is a clause implying "a reach to a problem beyond the

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<sup>1</sup>State law, not federal law, controls property rights, and to suggest that Kentucky must follow Florida property decisions is absurd. *Board of Regents of State Colleges v. Roth*, 408 U. S. 564 (1972).

academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74; 99 L. Ed. 897; 75 S. Ct. 614 (1954). The Court does not sit to resolve non-federal issues nor does it sit to resolve questions on the sufficiency of evidence. Those, however, are the real reasons why the Petitioners seek a writ. This Court has no choice but to strike down the Petition.

### CONCLUSION

This Court lacks certiorari jurisdiction under 28 U.S.C. § 1257, and the Petitioners fail to establish or set forth any reasons to believe so pursuant to Rule 21.1(h). Presented with a state court decision grounded on adequate state law principles; and provided with an argument on the merits instead of a description of any federal questions involved, conflicting opinions of other state or federal courts, or a new federal law decision; this Court has no option but to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified pursuant to U. S. Supreme Court Rule 28 that three copies hereof were mailed, first class U. S. Mail, postage prepaid, this 22nd day of July, 1987, to each of the following counsel of record: Nicholas W. Carlin, 911 Kentucky Home Life Building, Louisville, KY 40202, Counsel for Petitioners; Marvin Hirn, 2450 Meidinger Tower, Louisville, KY 40202, Counsel for Respondent Times Mirror; John Bilby, 2500 Brown & Williamson Tower, Louisville, KY 40202, Counsel for Respondent LG&E; and James Harralson, South Central Bell, P. O. Box 32410, Louisville, KY 40202, Counsel for Respondent South Central Bell.

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